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## **SIMPLY A MATTER OF GROWING PAINS? EVALUATING THE CONTROVERSY SURROUNDING THE GROWTH MANAGEMENT HEARINGS BOARDS**

Derek W. Woolston

*Abstract:* In 1990, the Washington Legislature enacted the Growth Management Act (GMA) intending to reduce urban sprawl and manage development throughout the state. In 1991, the GMA was amended to include an administrative dispute resolution system, involving three independent regional Growth Management Hearings Boards ("Boards") empowered to hear petitions and to determine whether a county or city is complying with the GMA. The breadth of discretion given to the Boards to scrutinize local government land use policies has prompted a barrage of criticism from both local governments and the regulated community. The tension is attributable to factors within the control of the Legislature and the Boards and also to factors external to the Boards. This Comment examines the role and scope of authority of the Boards as provided in the GMA and as demonstrated in the activities of the Boards since their creation. Major criticisms of the Boards are analyzed along with several external factors that have contributed greatly to the rising tensions. Finally, this Comment recommends amending the GMA to maintain the current benefits provided by the Boards while reducing the antagonism directed at them.

Since its enactment in 1990, Washington's growth management legislation, the Growth Management Act<sup>1</sup> (GMA or "Act"), has been enthusiastically embraced by some and severely criticized by others. The scope of the debate surrounding the GMA is broad, including both state and local politics and disagreements over growth management policies.<sup>2</sup> The debate has its beginnings in Washington's tremendous population growth over the past two decades.<sup>3</sup> In the late 1980s, residents living in or near the Puget Sound area feared that the rapid influx of people would undermine the quality of life in the region by transforming it into something akin to Southern California, with its urban sprawl, severe traffic problems, and environmental degradation.<sup>4</sup> The 1990 Legislature

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1. Wash. Rev. Code ch. 36.70A (1994).

2. See generally Kery Murakami, *Land Use Lights Up 3 Senate Races: Republicans Also Target Law Limiting Growth*, Seattle Times, Apr. 30, 1996, at B4 (discussing how GMA has created political firestorm).

3. Steve Wells, *Status of County/City Implementation of GMA*, in *Growth Management, Regulatory Reform, & Initiative 164* at 3-1, 3-3 (Env't. & Land Use Sec., Wash. State Bar Ass'n eds., 1995). During the 1970s, the state grew by 719,000 people and during the 1980s by more than 734,000. Since the GMA was enacted in 1990, the population of Washington has grown from 4.8 million to 5.43 million people, an increase of 630,000 people in half a decade. By the year 2010, Washington is projected to have 1.4 million additional residents. *Id.*

4. See Charles G. Gavigan, *The Politics of Growth Management: Compromise Begins Complex, Contentious Planning Process*, in *Washington Growth Management Act H-1, H-3* (U. of Wash. Ctr.

responded to these fears by enacting the first of two phases of the GMA.<sup>5</sup> As one of the most far-reaching pieces of legislation in the history of Washington, the Act affects most land use decisions, consolidates the efforts of state, county, and city governments, and requires a long-term strategy that seldom has been used in Washington land and resource management.<sup>6</sup> Consequently, the GMA has created many challenges for state and local government, private enterprise, and the public.

The second phase of the GMA established a dispute resolution system,<sup>7</sup> and created three regional and independent Growth Management Hearings Boards ("Boards").<sup>8</sup> Empowered to hear and resolve disputes involving state, city, and county compliance with the GMA, the Boards interpret the GMA and enforce governmental compliance with the Act.<sup>9</sup> As the only state agency authorized to adjudicate GMA disputes,<sup>10</sup> the Boards have faced increasing distrust and antagonism. In particular, the Boards are criticized for misapplying the standard of review, assuming broad powers when interpreting and enforcing the Act, and substituting their own vision of growth

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for Urban Horticulture ed., 1992); Robert H. Freilich et al., *Economic Development and Public Transit: Making the Most of the Washington Growth Management Act*, 16 U. Puget Sound L. Rev. 949, 949-50 (1993); Richard L. Settle & Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future*, 16 U. Puget Sound L. Rev. 867, 871 (1993).

5. See Settle & Gavigan, *supra* note 4, at 871-72. See generally Wash. Rev. Code § 36.70A.010. The 1990 Legislature enacted the landmark GMA to guide Washington as it grows into the future, finding:

[T]hat uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and wise use of our lands, pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state. It is in the public interest that citizens, communities, local governments, and the private sector cooperate and coordinate with one another in comprehensive land use planning.

Wash. Rev. Code § 36.70A.010.

6. Washington State Growth Strategies Comm'n, *Draft Land Use Issue Paper 14*, at 16 (Feb. 2, 1990); see also Gavigan, *supra* note 4, at H-3 (explaining that growth management movement expands traditional land use policies); Wells, *supra* note 3, at 3-5 to 3-8 (specifying requirements for counties and cities who must or choose to be subject to GMA).

7. Growth Management Act, ch. 32, 1991 Wash. Laws 2903, 2907-12 (revising GMA). See generally Larry J. Smith, *Planning for Growth, Washington Style*, in *State & Regional Comprehensive Planning: Implementing New Methods for Growth Management* 138, 142-43 (Peter A. Buchsbaum & Larry J. Smith eds., 1993).

8. Wash. Rev. Code §§ 36.70A.250-.340 (1992). The name of the Boards was changed in mid-1994 from the Growth Planning Hearings Boards to the Growth Management Hearings Boards. Wash. Rev. Code Ann. § 36.70A.270 n.1 (West 1994).

9. Wash. Rev. Code § 36.70A.280(1)(a); see also Wash. Admin. Code § 242-02-020 (1995).

10. See *infra* part I.B.

management for that of local communities.<sup>11</sup> On the other hand, factors not directly attributable to the Boards help explain the growing antagonism: a shift of land use decision-making power from local governments to the state;<sup>12</sup> a refusal by some local government officials, private property owners, and developers to “buy into” the policies of the GMA;<sup>13</sup> and vague language in key provisions of the Act that creates confusion and uncertainty.<sup>14</sup>

This Comment examines the current debate surrounding the GMA dispute resolution system. Part I provides an overview of the current practices and procedures of the Boards and discusses the volatile context in which the Boards operate. Part II analyzes the main criticisms of the Boards and asserts that the Boards misapply the standard of review mandated by the Act, creating an excessive burden on local government. Finally, part III recommends that the Washington State Legislature clarify several controversial provisions in the GMA, better define the role and scope of authority of the Boards, and expand the mediation program to include all parties involved in GMA disputes.

## I. A CONTROVERSIAL STATUTE: THE GMA IN WASHINGTON

The GMA is considered a revolution in land use law in Washington.<sup>15</sup> At the heart of Washington’s planning program are thirteen policy goals that are meant to guide local governments as they develop and adopt plans and regulations.<sup>16</sup> Essentially, the statute is intended to provide a

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11. See *infra* part II.

12. See *infra* part I.C.

13. See *infra* part I.C.

14. See *infra* part I.C.

15. See Settle & Gavigan, *supra* note 4, at 940. Growth management consists of “a conscious government program intended to influence the rate, amount, type, location, and/or quality of future development within a local jurisdiction.” Daniel R. Mandelker & Roger A. Cunningham, *Planning and Control of Land Development* 595–96 (3d ed. 1990) (quoting D. Godschalk et al., *Constitutional Issues of Growth Management* 8–10 (rev. ed. 1979)).

16. Wash. Rev. Code § 36.70A.020. The following GMA goals are considered by counties and cities when developing their comprehensive plans and development regulations: (1) encouraging development in urban areas; (2) reducing sprawl; (3) encouraging efficient multimodal transportation; (4) encouraging a variety of residential densities and housing stock, including affordable housing; (5) encouraging economic development; (6) prohibiting governmental “takings” of private property without just compensation; (7) encouraging timely and fair permit processing; (8) maintaining and enhancing natural resource-based industries and encouraging conservation of productive forest and agricultural lands; (9) encouraging open space, development of recreational opportunities, and conservation of fish and wildlife habitat; (10) protecting the environment; (11)

framework for local governments<sup>17</sup> to make tough choices about how best to prepare for population growth in their communities and to help them coordinate their plans with neighboring jurisdictions.<sup>18</sup>

### A. Overview of the GMA

The GMA framework's main component is the comprehensive plan ("plan") that "replaces zoning and development regulations as the [new] 'constitution' of [Washington] land use law."<sup>19</sup> Under the plan, local governments must forecast a community's twenty-year population growth, determine where public facilities<sup>20</sup> and services<sup>21</sup> will be located, and how the development and services will be financed.<sup>22</sup> A key element of the new land use system is the commitment to urban growth areas (UGA) "within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature."<sup>23</sup>

encouraging citizen participation; (12) requiring that public facilities and services necessary to support development are adequate at the time development is available for occupancy; and (13) identifying and encouraging the preservation of sites with historical or archaeological significance. § 36.70A.020. The Central and Eastern Boards require that every jurisdiction "meet and comply with the Act's planning goals." See *Save Our Butte Save Our Basin Soc. v. Chelan County*, 94-1-0001 EWGPHB 505, 509 (July 1994) (requiring that county's actions be substantially guided by goals); *Association of Rural Residents v. Kitsap County*, 93-3-0010 CPSGPHB 405, 423 (June 1994) (stating that planning goals lead entire process and are integral to Act).

17. All counties and cities must designate natural resource lands and critical areas regardless of whether they are planning under the GMA. Wash. Rev. Code § 36.70A.060(2). Specific counties, and cities located within those counties, must comply with all requirements of the GMA if they meet specific population growth rates or choose to be subject to the GMA. § 36.70A.040(1)-(2). Twenty-nine out of thirty-nine counties are subject to the GMA. *Settle & Gavigan*, *supra* note 4, at 872.

18. See Wash. Rev. Code § 36.70A.010; see also *Gavigan*, *supra* note 4, at H-3 (explaining that GMA requires planning on regional basis).

19. *Smith*, *supra* note 7, at 138-39; see also *Berschauer v. Tumwater*, 94-2-0002 WWGMHB 529, 537 (July 1994) (finding that GMA requires local government adopt comprehensive plan that is internally consistent document (1) guided by GMA planning goals, (2) guided by countywide planning policies, and (3) based on objectives, principles, and standards).

20. Wash. Rev. Code § 36.70A.030(12) (defining "[p]ublic facilities" to "include streets, roads, highways, sidewalks, street and road lighting systems, traffic signals, domestic water systems, storm and sanitary sewer systems, parks and recreational facilities, and schools").

21. § 36.70A.030(13) (defining "[p]ublic services" to "include fire protection and suppression, law enforcement, public health, education, recreation, environmental protection, and other governmental services").

22. See *Wells*, *supra* note 3, at 3-8.

23. Wash. Rev. Code § 36.70A.110. "The GMA universe consists of three major land use types: (1) resource lands (designated forest, agricultural and mineral resource lands); (2) urban lands, which are within UGA's; and (3) rural lands which are entirely outside UGA's and exclude resource lands." *Bremerton v. Kitsap County*, 95-3-0039 CPSGMHB 1167, 1198 (Oct. 1995).

The Act takes a “bottom up” approach in that all planning and implementation under the GMA is left to each city and county.<sup>24</sup> The GMA, however, requires that local governments<sup>25</sup> comply with the thirteen goals and meet planning requirements within specified time frames.<sup>26</sup> In particular, counties and cities planning under the GMA must do the following: adopt a countywide planning policy;<sup>27</sup> adopt development regulations that conserve designated critical areas, agricultural lands, forest lands, and mineral resource lands; develop a comprehensive plan; and designate UGAs.<sup>28</sup>

The first phase of the GMA required planning activities and imposed deadlines on cities and counties, but failed to provide for administrative appeals of local government actions by private citizens;<sup>29</sup> the superior courts were the only recourse.<sup>30</sup> Shortly after the first phase was enacted, the Growth Strategies Commission<sup>31</sup> was charged with providing a

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24. Keith W. Dearborn & Ann M. Gygi, *Planner's Panacea or Pandora's Box: A Realistic Assessment of the Role of Urban Growth Areas in Achieving Growth Management Goals*, 16 U. Puget Sound L. Rev. 975, 976 n.3 (1993). Dearborn and Gygi note that:

The term “bottom up” connotes a locally controlled process for decision-making[sic] on growth management issues. While the [GMA] does not use the term ‘bottom up’ in its text, the Department of Community Development . . . has developed procedural criteria, mandated by the GMA, which state that a major feature of the GMA is “[t]he concept that the process should be a ‘bottom up’ effort, involving early and continuous public participation, with the central focus of decision making at the local level.”

*Id.* (citations omitted).

25. Wash. Rev. Code § 36.70A.040(1)–(2) (providing that counties and cities located within those counties must comply with all requirements of GMA if they meet specific population growth rates or choose to be subject to GMA). Twenty-nine out of thirty-nine counties are subject to the GMA. Settle & Gavigan, *supra* note 4, at 872. All counties and cities must designate natural resource lands and critical areas. Wash. Rev. Code § 36.70A.060(2).

26. § 36.70A.040(3).

27. § 36.70A.210 (requiring counties to adopt countywide planning policies in cooperation with cities); *see also* Snoqualmie v. King County, 92-3-0004 CPSGPHB 51 (Mar. 1993) (countywide planning policies are adopted by counties and used as framework by both counties and cities to ensure that planning will be coordinated and consistent).

28. Wash. Rev. Code § 36.70A.040(3).

29. *See* Smith, *supra* note 7, at 142 (suggesting that problem of having to resort immediately to superior courts is solved with creation of Boards).

30. Wash. Rev. Code ch. 36.70A (1990).

31. Wash. Rev. Code § 36.70A.800 (1991). The Growth Strategies Commission was created by an executive order from Governor Booth Gardner and was charged with three major tasks: (1) “[a]nalyze different methods for assuring that county and city comprehensive plans adopted under [the GMA] are consistent with the planning goals under RCW 36.70A.020 and with other requirements of chapter 36.70A RCW; (2) [r]ecommend to the legislature and the governor by October 1, 1990, a specific structure or process” for accomplishing several major growth management objectives; and (3) “[d]evelop recommendations to provide for the resolution of

means for resolving disputes between jurisdictions, clarifying inconsistencies in the language of the statute, and answering interpretative questions without long delays anticipated from judicial resolution of disputes.<sup>32</sup> To resolve GMA conflicts, the Commission recommended creating an independent dispute resolution system composed of a panel of independent arbitrators employing mediation and binding arbitration.<sup>33</sup> Appeals to the Washington State Court of Appeals would be limited to constitutional and procedural issues, such as notice, publication requirements, and the opportunity to participate in a hearing.<sup>34</sup> The Legislature decided, however, that GMA dispute resolution should be administered by an independent state agency.<sup>35</sup> In 1991, as part of the second phase of the GMA, the Legislature established three independent administrative hearings boards.<sup>36</sup>

## *B. The GMA's Dispute Resolution System*

### *1. The Limited Role of the Department of Community, Trade and Economic Development*

Consistent with the GMA's "bottom up" approach, the Legislature has limited the role of the Department of Community, Trade and Economic Development (DCTED)<sup>37</sup> to an informational and assistance role rather than a regulatory and enforcement role.<sup>38</sup> In contrast, Oregon and Florida,

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disputes over [UGAs] between counties and cities, including incorporations and annexations." Wash. Rev. Code § 36.70A.800.

32. William H. Nielsen et al., *Practice and Procedure Before the Growth Planning Hearings Boards*, 16 U. Puget Sound L. Rev. 1323, 1323-24 (1993).

33. Washington State Growth Strategies Comm'n, *A Growth Strategy for Washington State: Final Report* 16 (1990).

34. *Id.*; see also Nielsen et al., *supra* note 32, at 1324 n.6 (finding that constitutional and procedural issues consist of "notice, publication requirements, and the opportunity to participate in the hearing").

35. See Nielsen et al., *supra* note 32, at 1324.

36. *Id.*; see also *West Seattle Defense Fund v. Seattle*, 94-3-0016 CPSGMHB 773, 774 (Apr. 1995) (explaining that Legislature created three independent boards in acknowledgment of Washington's regional diversity and patterned after three independent divisions of court of appeals).

37. The DCTED is a state agency with varied responsibilities, such as serving as the central coordinator for state government in the implementation of the GMA. Wash. Rev. Code § 43.330.120 (1994).

38. See generally Jeffrey M. Eustis, *Between Scylla and Charybdis: Growth Management Act Implementation That Avoids Takings and Substantive Due Process Limitations*, 16 U. Puget Sound L. Rev. 1181, 1185 (1993) ("[K]eeping with the state's tradition of strong local control, the GMA allows for considerable local variation and prescribes a rather limited role for the state oversight agency, [the DCTED].").

two states with growth management laws, have provided their state agencies with more authority than the DCTED.<sup>39</sup> Oregon's Land Conservation and Development Commission (LCDC) has the power to adopt statewide land use planning goals.<sup>40</sup> In addition, the LCDC is empowered to review and "acknowledge" (approve) both comprehensive plans and regulations or to order a municipality to bring its plan or regulation into compliance with the goals.<sup>41</sup> Florida has a compliance agreement process, whereby the Florida Department of Community Affairs determines whether comprehensive plans are in compliance with the state planning requirements.<sup>42</sup>

Although limited in legislative authority, the DCTED serves several important functions under the GMA.<sup>43</sup> One of the DCTED's functions is to provide mediation services;<sup>44</sup> those services are limited, however, to disputes between counties and cities.<sup>45</sup> The DCTED also provides "technical and financial assistance and incentives to counties and cities to encourage and facilitate the adoption and implementation of comprehensive plans and development regulations throughout the state."<sup>46</sup> The technical assistance includes promulgating procedural criteria to assist counties and cities as they adopt comprehensive plans and development regulations that meet the GMA's goals and requirements,<sup>47</sup> while the financial assistance includes a grant program.<sup>48</sup> Finally, the DCTED reviews comprehensive plans and development regulations for compliance with the GMA and, if necessary, challenges the plan or regulation before the Boards.<sup>49</sup>

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39. *Id.* at 1185-86.

40. Or. Rev. Stat. §§ 197.030-.065, .225 (1995).

41. Or. Rev. Stat. §§ 197.251, .271, .320 (1995).

42. Fla. Stat. Ann. § 163.3164(19), .3184 (West 1990). If a plan is found not to comply with the growth management goals and policies, the Department of Administration Hearings Office conducts a hearing and determines the appropriate remedy. § 163.3184.

43. *See* Wash. Rev. Code §§ 36.70A.190, 43.330.120 (1994).

44. *See* § 36.70A.190(5); *see also* § 36.70A.210(2)(d) (providing that "governor may . . . request the assistance of the [DCTED] to mediate any disputes that preclude agreement").

45. § 36.70A.190(5).

46. § 36.70A.190(1).

47. Wash. Admin. Code § 365-195-020 (1995); *see also* Wash. Rev. Code § 36.70A.190(4)(b) (providing that criteria "reflect regional and local variations and the diversity that exists among different counties and cities . . .").

48. Wash. Rev. Code § 36.70A.190(3).

49. *See* Settle & Gavigan, *supra* note 4, at 928.



## 2. *The Expansive Role of the Growth Management Hearings Boards*

In sharp contrast to the limited role assumed by the DCTED, the three regional Boards play an integral role in resolving GMA disputes. Petitions to the Boards by private and public parties provide a mechanism for ensuring that local governments are complying with the GMA.<sup>50</sup> The geographic jurisdiction of the Boards is split by county: the Eastern Washington Growth Management Hearings Board ("Eastern Board") covers Washington counties east of the Cascade Mountain Range; the Central Puget Sound Growth Management Hearings Board ("Central Board") covers King, Pierce, Snohomish, and Kitsap Counties; and the Western Washington Growth Management Hearings Board ("Western Board") covers the remaining counties in Western Washington.<sup>51</sup> Each Board is composed of three members who must be "qualified by experience or training in matters pertaining to land use planning" and who must "resid[e] within the jurisdictional boundaries of the applicable Board."<sup>52</sup> At least one member of each Board must have practiced law in Washington, and at least one member must have held an elected position in a city or county government.<sup>53</sup> A quorum, consisting of two of the three members of a Board, has the authority to decide cases and order compliance, adopt rules necessary to carry out its powers and duties, and manage other official business.<sup>54</sup> The Boards have determined that they are "quasi-judicial" bodies, an important distinction when considering the Boards' role and their authority to resolve disputes arising under the GMA.<sup>55</sup> Consequently, the Boards are expressly subject to the Washington Administrative Procedure Act<sup>56</sup> (APA) and are required to jointly adopt rules of practice and procedure.<sup>57</sup>

The GMA limits the Boards' subject matter jurisdiction to petitions challenging a local government's compliance with the GMA or the

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50. See Smith, *supra* note 7, at 142-43.

51. Wash. Rev. Code § 36.70A.250.

52. § 36.70A.260(1).

53. § 36.70A.260(1).

54. § 36.70A.270(4).

55. Wash. Admin. Code § 242-04-020(1) (1995); see also *Twin Falls, Inc., v. Snohomish County*, 93-3-0003 CPSGPHB 183, 216-17 (Sept. 1993). A quasi-judicial body determines "the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding." Wash. Rev. Code § 42.36.010.

56. Wash. Rev. Code ch. 34.05 (1994).

57. Wash. Rev. Code § 36.70A.270(7); see also Wash. Admin. Code § 242-02-050 (1995) (stating that rules shall govern all practice and procedure for hearings before board).

accuracy of the Office of Financial Management's twenty-year growth management planning population projections.<sup>58</sup> In 1995, the Legislature expanded the GMA definition of "development regulations"<sup>59</sup> to include shoreline master programs.<sup>60</sup> The Legislature also clarified the definition by including critical areas ordinances and stating that "development regulations" do not include project permit application approvals, even though the approvals may be expressed in a resolution or ordinance of the county's or city's legislative body.<sup>61</sup> In accordance with the Act, the Boards have determined that they do not have jurisdiction over statutes other than the GMA and the State Environmental Policy Act (SEPA).<sup>62</sup> Moreover, they have determined that their jurisdiction does not include federal and state constitutional issues arising from implementation of the Act.<sup>63</sup>

The GMA contains a straightforward provision describing the persons who are entitled to file a petition for review to challenge a GMA plan or development regulation before one of the Boards.<sup>64</sup> In reviewing

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58. Wash. Rev. Code § 36.70A.280 (Supp. 1995). The only documents appealable to the Boards are comprehensive plans and development regulations.

59. Wash. Rev. Code § 36.70A.030(7) (Supp. 1995) (defining development regulations).

60. See S. 5776, 54th Leg., Reg. Sess. (Wash. 1995) (amending Wash. Rev. Code § 36.70A.030). The Boards must review whether the adoption of a shoreline master program or amendment complies with the Shoreline Management Act. Wash. Rev. Code § 36.70A.280(1)(a). A shoreline master program must be adopted pursuant to Revised Code of Washington chapter 90.58, and not under the requirements of the GMA. See *Integration of Growth Management Planning and Environmental Review*, ch. 347, 1995 Wash. Laws 1556, 1561.

61. See S. 5776. Though the GMA has always required adoption of regulations protecting critical areas, the definition of "development regulations" previously did not include critical areas. Wash. Rev. Code ch. 36.70A. "Critical areas" include the following areas and ecosystems: (a) [w]etlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas." § 36.70A.030(5).

62. See *Mahr v. Thurston County*, 94-2-0007 WWGMHB 579, 581 (Sept. 1994); *Twin Falls, Inc., v. Snohomish County*, 93-2-0003 CPSGPHB 155, 162 (June 1993); *North Cascades Conservation Council & Washington Envtl. Council v. Chelan County Bd. of Adjustment*, 93-1-0001 EWGPHB 171, 171-72 (May 1993); *Gutschmidt v. Mercer Island*, 92-3-0006 CPSGPHB 81, 86 (Mar. 1993).

63. See *Mahr*, 94-2-0007 WWGMHB at 580-81.

64. Wash. Rev. Code § 36.70A.280(2). The statute confers standing on five classes of persons: (1) the state; (2) a city or county planning under the GMA; (3) a person who has appeared before the local jurisdiction planning under the GMA concerning the matter on which review is requested; (4) a person whose request for review is certified by the Governor within 60 days of filing that request; or (5) a person qualified under the Washington APA's provision for judicial review of agency action, Revised Code of Washington section 34.05.530. § 36.70A.280(2); see also § 36.70A.280(3) (defining "person" as "any individual, partnership, corporation, association, governmental subdivision or unit thereof, or public or private organization or entity of any character"); Peter J. Eglick & Bob C. Sterbank, *Recent Growth Management Hearings Board Decisions: Standing To Maintain a Petition for Review Before Washington's Growth Management Hearings Boards*, in

petitions within their jurisdictions, the Boards base their decisions on the record developed by the local government or by the state and supplement the record only when "necessary or of substantial assistance to the [B]oard in reaching its decision."<sup>65</sup> The review is not *de novo*.<sup>66</sup>

Comprehensive plans and development regulations are presumed valid upon adoption.<sup>67</sup> When a Board considers whether such enactments comply with the GMA, it must uphold the enactments unless it finds by a preponderance of the evidence that the GMA was misinterpreted or misapplied.<sup>68</sup> The petitioner bears the burden of proving that the local government's action or failure to act does not comply with the GMA's requirements.<sup>69</sup> Ultimately, the Board's decision must be based on the record.<sup>70</sup> The Central Board has found that the petitioner must do more than merely raise an issue; rather, "[t]he Board must review the petitioner's rationale for its contention, and weigh that argument against the local government's response."<sup>71</sup> The Western Board has stated that where a record is "incomplete or insufficient because of the failure to submit pertinent portions, the failure to preserve, or the failure to

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*Growth Management, Regulatory Reform, & Initiative 164*, *supra* note 3, at 5B-1 (discussing standing requirements under GMA).

65. Wash. Rev. Code § 36.70A.290(4).

66. *See* *Twin Falls, Inc., v. Snohomish County*, 93-3-0003 CPSGPHB 183, 217 (Sept. 1993); *Clark County Natural Resources Council v. Clark County*, 92-2-0001 WWGPHB 5, 6 (Nov. 1992).

67. Wash. Rev. Code § 36.70A.320(1); *see also* Wash. Admin. Code § 365-195-050 (1995).

68. Wash. Rev. Code § 36.70A.320(1); *see also* Nielsen et al., *supra* note 32, at 1325. In *Twin Falls*, the Central Board found that local governments enjoy substantial deference from the Board; however, under the GMA, that deference is diminished when the presumption of validity is overcome by a preponderance of the evidence. 93-3-0003 CPSBPHB at 223.

69. Wash. Admin. Code § 242-02-632 (1995); *see also* Wash. Rev. Code § 36.70A.290 (Supp. 1995); *see, e.g.*, *Berschauer v. Tumwater*, 94-2-0002 WWGMHB 529, 530-31 (July 1994). The Western Board analyzes a petitioner's:

[A]ssertions of non-compliance in the context of the following framework:

- (1) Is the plan the result of a considered application of appropriate goals and requirements of the Act?
- (2) Did the process comply with the public participation requirements of the Act?
- (3) Was the deliberation and decision-making process reasoned?
  - (a) Is the plan supported by reasoned choices based upon appropriate factors actually considered as contained in the record?
  - (b) Were inappropriate factors avoided?
- (4) Does the plan fall within the discretion granted to the decision-maker to choose from a range of reasonable options?.

*Id.* at 530-31; *see also* *Clark County Natural Resources Council*, 92-2-0001 WWGMHB at 7 (using same test). The test used by the Central Board differs. *See infra* note 197.

70. Wash. Rev. Code § 36.70A.290(4).

71. *Twin Falls*, 93-3-0003 CPSGPHB at 195.

consider an important matter, the absence of evidence can be persuasive for carrying a burden of proof.”<sup>72</sup>

The Boards have encountered both procedural and substantive issues,<sup>73</sup> stressing the main goals of the GMA: “to concentrate urban growth in compact, high-density areas, to provide adequate urban services at the time of development, and to protect the environment and natural resources industries.”<sup>74</sup> However, the Boards may provide only limited relief to successful petitioners.<sup>75</sup> When a Board concludes that a state agency, county, or city has not complied with the GMA, the matter must be remanded to the government entity with directions to comply within a specified period.<sup>76</sup> After this period expires, the Board must hold a hearing to determine compliance.<sup>77</sup> The Boards must transmit to the Governor all findings of noncompliance whether or not a recommendation for sanctions is made.<sup>78</sup> After the Board has either issued a final order or denied a motion for reconsideration, the petitioner has thirty days to appeal the decision to a superior court.<sup>79</sup> The Central Board has heard the majority of cases, followed by the Western Board and the Eastern Board.<sup>80</sup> Several board decisions have been appealed to

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72. *Mahr v. Thurston County*, 94-2-0007 WWGMHB 631, 633 (Nov. 1994).

73. Some of the procedural issues include determining the extent of jurisdiction, the correct standard of review, and the requirements for standing. Substantive issues include interpreting key provisions of the GMA and defining ambiguous terms in an effort to answer the ultimate question of compliance. *See, e.g., Twin Falls*, 93-3-0003 CPSGPHB at 183.

74. Jay P. Derr et al., *Recent Growth Management Hearings Board Decisions*, in *Growth Management, Regulatory Reform, & Initiative 164*, *supra* note 3, at 5A-1, 5A-32.

75. Wash. Rev. Code § 36.70A.300(2) (giving Boards authority to invalidate comprehensive plans or development regulations only if Boards determine they will substantially interfere with fulfillment of GMA goals).

76. The state agency, county, or city is given 180 days to comply. § 36.70A.300(1). Since 1992, out of more than 300 cases, the Boards have sent back 56 local ordinances to counties and cities for more work. David Postman, *Growth Boards Targeted*, *Seattle Times*, Feb. 15, 1996, at B3 (statement by Les Eldridge, member of Western Washington Growth Management Hearings Board).

77. Wash. Rev. Code § 36.70A.330(1).

78. § 36.70A.330(3); *see also* Settle & Gavigan, *supra* note 4, at 927.

79. Wash. Rev. Code § 36.70A.300(5). In Oregon, by comparison, appeals from the Land Use Board of Appeals (LUBA) are to the Oregon Court of Appeals. Or. Rev. Stat. § 197.850(3)(a) (1995). The Court of Appeals operates under strict deadlines in land use appeals. § 197.855 (1995).

80. Through September 12, 1996, the Central Board had reviewed approximately 53 major cases, the Western Board approximately 36, and the Eastern Board approximately 17. *Growth Planning Hearings Boards, State of Washington* (Code Publishing Co. Sept. 12, 1996). The low volume of cases in the Eastern region has resulted in fewer original interpretations of the GMA by the Eastern Board; therefore, the majority of cases cited in this Comment will be from the Central and Western Boards.

superior court, but the heavy caseload of the superior court system has delayed timely resolution of the disputes.<sup>81</sup>

### 3. *Sanctions for Noncompliance*

Under the GMA, the Governor has the authority to sanction cities or counties that do not comply with the Act.<sup>82</sup> Most sanctions involve the temporary withholding of revenues collected by the state and, under normal circumstances, passed on to the local government.<sup>83</sup> In addition, a county or city that fails to comply risks losing certain funding and assistance provided by the GMA, such as technical assistance, grants, and priority funding for planning projects.<sup>84</sup>

### C. *Factors Contributing to the GMA Debate*

There are several explanations for a local government's failure to comply with the GMA. Enacting a far-reaching statute in a politically volatile area of the law inevitably leads to disagreement.<sup>85</sup> Washington's growth management laws are being challenged by the same issues that affect land use regulations generally: "more or less regulatory control; the effects of regulatory control on the economy, the environment, and the quality of life; whether control should be exercised at the state or

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81. Of the more than 300 petitions heard by the Boards, approximately 66 have been appealed to superior court, of those 66 approximately six have been reviewed by the court of appeals and four have been reviewed by the Washington Supreme Court. Memorandum from Marjorie T. Smith, Assistant Attorney Gen., Washington Attorney General's Office, to Derek W. Woolston (Nov. 15, 1996) (on file with *Washington Law Review*).

82. Wash. Rev. Code § 36.70A.345.

83. § 36.70A.340. Funds subject to the provision include those raised through the motor vehicle fuel tax, transportation improvement account, urban arterial trust account, rural arterial trust account, sales and use tax, liquor profits tax, and liquor excise tax. Carson D. Bowler, *The GMA Manual: A Guide to the Growth Management Act and the Decisions of the Growth Hearings Boards* 148 n.991 (1996).

84. Smith, *supra* note 7, at 143-44.

85. See Robert V. Percival et al., *Environmental Regulation: Law, Science, and Policy* 958-59 (1992). See generally Washington State Growth Strategies Comm'n, *Draft Governance Issue Paper* 3, at 13, 19 (Mar. 30, 1990). The Washington State Legislature consistently has met with vigorous opposition when considering state land use planning. As a result, Washington does not have a strong tradition of regional governance. Problem areas include local governments with competing responsibilities, limited funds for increasing local governmental duties, minimal state guidance to local governments, and limited and competing regional planning efforts. *Id.*

local level; and the effect of control on intergovernmental harmony.”<sup>86</sup> Displeasure with the Boards is based to some extent on differing ideas about how the GMA resolves those issues.

Despite this divisiveness the majority of communities have complied with the GMA.<sup>87</sup> The rate of population growth in the state necessitates that changes be made to the traditional land use planning and management system.<sup>88</sup> Governmental commitment to growth management is demonstrated by the significant investment of time and funds that have gone into GMA planning activities at the local level.<sup>89</sup>

### 1. *Resisting Change: The Loss of Local Control over Land Use Management*

The tension surrounding the GMA can be explained in part by the resistance of some local governments to relinquish control over land use matters.<sup>90</sup> Prior to the GMA, land use decisions were left to local governments because of the prevailing notion that an individual community should decide what is best for its well-being and quality of life.<sup>91</sup> County and city officials were subject to few requirements, as zoning and related forms of regulation were not mandatory.<sup>92</sup> Local governments were largely autonomous in the realms of general land use, public facility planning, and development regulation.<sup>93</sup> “Given the lack of legal compulsion to manage growth and the cost and political risks of

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86. Robert W. Burchell, *Issues, Actors, and Analyses in Statewide Comprehensive Planning, in State & Regional Comprehensive Planning: Implementing New Methods for Growth Management* 18, 19 (Peter A. Buchsbaum & Larry J. Smith eds., 1993).

87. Wells, *supra* note 3, at 3-8 to 3-9. The cost of change, both monetarily and socially, is high. However, the burden has not prevented most counties and cities from making progress. *Id.* As of August 5, 1995, 67% of cities and counties planning under the GMA had submitted draft comprehensive plans and 61.4% of those drafts had been adopted by the county or city. Twenty-eight of the twenty-nine counties required to adopt countywide planning policies have done so. *Id.* at 3-9.

88. *Id.* at 3-8 to 3-9.

89. *Id.* at 3-8. Through DCTED, the State has contributed \$35 million toward local GMA expenses, covering about one-third of the total costs. *Id.*

90. See Murakami, *supra* note 2.

91. See Settle & Gavigan, *supra* note 4, at 876; see also Gavigan, *supra* note 4, at H-3.

92. *Id.* The State Zoning and Enabling Acts did not have many requirements.

93. *Id.* Washington State has historically made growth and development decisions at the local level. Cities and counties planned with minimal state guidance. Many communities preferred small and diverse local governments, believing that they had greater access and control over governmental decisions. Washington State Growth Strategies Comm’n, *Draft Governance Issue Paper 8*, at 10 (Mar. 30, 1990).

doing so, few local governments" expended time and funds on formal growth management planning.<sup>94</sup>

With the GMA, the Legislature thrust the state into a traditionally local enterprise and thereby shifted power from local to state officials.<sup>95</sup> Not surprisingly, this intrusion has angered some local officials.<sup>96</sup> Despite the Legislature's attempt to leave the majority of control and planning responsibilities at the local level, some local officials argue that the State is too involved in matters that lie exclusively within the domain of local government.<sup>97</sup> The GMA has placed on local governments the burden of considering the needs of other jurisdictions as well as complying with the state's demands on an array of matters.<sup>98</sup>

Preserving "local control within a framework of state goals and requirements" continues to be the GMA's major challenge.<sup>99</sup> Difficulties arise for county and city elected officials when statewide goals conflict with the demands of their constituents.<sup>100</sup> These conflicts arise most often in rural counties, where resistance to state restrictions on land use seems strongest.<sup>101</sup> For example, local officials are disturbed when a state hearings board overturns a land use ordinance by interpreting a GMA requirement to be more restrictive than they determined it to be.<sup>102</sup> An act by a local government, once thought to be purely legislative in nature, is now considered to be a matter open to full judicial review by a state agency.<sup>103</sup>

Although some local governments generally support the GMA and what it purports to accomplish, others want nothing to do with it.<sup>104</sup> Even when a local government is willing to meet the requirements of the

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94. See Settle & Gavigan, *supra* note 4, at 880; see also Washington State Growth Strategies Comm'n, *Draft Governance Issue Paper 9* (Mar. 30, 1990) (finding that "revenue shortages have caused many of the growth problems," including "not enough local government funds to plan ahead for growth, nor provide the necessary infrastructure and open space").

95. See Bowler, *supra* note 83, at 20-21.

96. See Murakami *supra* note 2.

97. *Id.*; see also *supra* note 24 and accompanying text.

98. See *supra* note 5.

99. S. 6637, 54th Leg., Reg. Sess., partial veto message (Wash. 1996) (Lowry, Gov., vetoing).

100. See Murakami, *supra* note 2.

101. *Id.*

102. *Id.*

103. *Id.*

104. See Carol M. Ostrom, *Land Use Planning—Or Just Land Grab?*, Seattle Times, Feb. 8, 1996, at A1. Several counties have had their plans or regulations invalidated by the Boards. In addition, Chelan County has been targeted with sanctions by the Governor at the recommendation of the Eastern Board. *Id.* at A11.

GMA, adopting land use ordinances that fully comply with the Act is difficult.<sup>105</sup> When a local government is adverse to the requirements of the GMA, meeting the requirements of the GMA is seen as an act of unbridled state intrusion into purely local affairs.<sup>106</sup> For example, the Boards have been given the power to invalidate an ordinance that is deemed to contravene the Act.<sup>107</sup> Invalidating an ordinance or a regulation tends to create considerable uncertainty for local governments, property owners, and developers.<sup>108</sup> Several counties claim that conferring such power on the Boards is an unconstitutional intrusion of the inherent police powers reserved to local government.<sup>109</sup> The controversy over the distribution of power between state and local jurisdictions will most likely continue to generate challenges well into the future for those implementing and enforcing the GMA. Closely linked with local officials' frustrations at the involvement of the state in land use management decisions are private property owners' frustrations with restrictions imposed by the GMA in the use of their property.

## 2. *The Ongoing Property Rights vs. Planned Growth Battle*

The debate between advocates for property rights and advocates for government controlled growth consists of a mixture of politics, policy

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105. See Settle & Gavigan, *supra* note 4, at 896–97. “[L]ocal governments must endure incessant, acrimonious debate, make extremely difficult political choices, and formulate complex plans and regulations.” *Id.*

106. See Murakami, *supra* note 2.

107. Wash. Rev. Code § 36.70A.300 (Supp. 1995); H.B. 1724, 54th Leg., Reg. Sess., ch. 347 § 110, 1995 Wash. Laws 1564. The Legislature amended Revised Code of Washington § 36.70A.300 of the GMA by enabling the Boards to invalidate local legislation found not to be in compliance with a provision of the Act. In addition, if the local government ordinance has a savings clause, the Board can prevent its use if the Board also finds that the former legislation does not comply with the GMA. *Id.*

108. The dilemma facing local government officials is what to do if both the enacted growth management regulations and the pre-GMA regulations are invalidated by the Board. In such a case, the community would be without laws until a valid regulation is adopted. See Chelan County v. Washington, Petition to the Washington Supreme Court Against State Officers and Declaratory Judgment, Dec. 15, 1995; see also, e.g., Friends of Skagit County v. Skagit County, 95-2-0065 WWGMHB 1543, 1547 (Feb. 1996) (declaring several sections of Skagit County zoning code invalid because they “egregiously interfere with the County’s future ability to fulfill the goals of the Act”).

109. See, e.g., Chelan County v. State, Petition to the Washington Supreme Court Against State Officers and Declaratory Judgment, Dec. 15, 1995 (arguing that state Legislature has no constitutional power to “command” or “coerce” local government to exercise its inherent police power to adopt substantive policy).



arguments, and private agendas.<sup>110</sup> The divisiveness surrounding land use management under the GMA often pits neighbor against neighbor.<sup>111</sup> For example, the GMA provides that counties designate UGAs as boundaries that surround established cities.<sup>112</sup> Cities with constituents in favor of growth are upset when the county limits the amount of land earmarked for growth.<sup>113</sup> On the other hand, cities with constituents opposed to growth are upset when the county designates too much land for development.<sup>114</sup> Some rural property owners argue for more development to increase their property values, while others support less development to prevent sprawl and preserve their rural surroundings.<sup>115</sup> Opposition to growth management also comes from developers, speculators in vacant lands near the urban-rural fringe, and farmers outside the UGAs who anticipate selling their property to developers.<sup>116</sup> Property rights groups also have resisted growth management on the grounds that it improperly, and even illegally, encroaches on the property rights of land owners.<sup>117</sup>

Controversies that end up before the Boards often involve residents of a community that oppose some development that has been approved by the local government. An example is the Blakely Ridge development in

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110. See, e.g., Ostrom, *supra* note 104, at A1. In Chelan County, the GMA has generated heated debate. County Commissioner John Wall and other property rights advocates perceive the GMA as a tool for urban residents to preserve the environment at the expense of rural residents. But others in the same county who support planning fear that unfettered growth will destroy their way of life. *Id.*

111. *Id.*

112. Wash. Rev. Code § 36.70A.110(1); see *supra* part I.A.

113. See Ostrom, *supra* note 104.

114. See, e.g., Bob Simmons, *New Cities Coming*, *Eastsideweek* (Seattle), Mar. 13, 1996, at 14, 16. King County has approved large urban-like developments outside of the UGA surrounding Redmond. These developments are strongly opposed by Redmond's residents due to the potential costs of providing capital facilities, the environmental impact, and the increased traffic. *Id.* at 17.

115. *Id.* at 22.

116. Katherine Long, *'Last Stand' Looms Over Blakely Ridge Developments*, *Seattle Times*, Apr. 10, 1995, at B1. Developers have sought protection through legislation because they say the Boards have favored restrictions on development. The Central Board remanded Kitsap County's comprehensive plan on finding that the plan would allow too much sprawl. King County Councilman Chris Vance has referred to Central Board members as "unelected bureaucrats thwarting legislative intent," claiming that Governor Lowry appointed "nothing but left-wing intellectuals to the hearings board." *Id.*; see also Murakami, *supra* note 2.

117. See, e.g., Aagaard v. Bothell, 94-3-0011 CPSGMHB 711 (Feb. 1994) (objecting to plan's designation of their respective properties, individual property owners challenge Bothell's comprehensive plan); see also Stephen Clutter, *Landowners Leery of County Plan*, *Seattle Times*, Nov. 13, 1996, at B1 (describing how property owners are just beginning to realize that they may have lost their right to develop their property because their land was designated as farm and forest districts two years ago).

Redmond.<sup>118</sup> The plan is to build a 1000 acre community with about 4000 residents, a retail village, and a golf course in an area designated as rural and consisting partially of wetlands.<sup>119</sup> The petitioners consist of organizations and private individuals opposed to development outside of the UGAs.<sup>120</sup> The King County Council permitted the developer to move forward with the project based on the “fully contained communities” exception in the GMA.<sup>121</sup> The Central Board found that the development did not comply with the GMA, but said it would not stand in the way if King County established that the development met the criteria of the “fully contained communities” safe harbor.<sup>122</sup> Local residents displeased with King County’s approval of the development sued the county in superior court.<sup>123</sup> Just one of many battles being waged over the implementation of the Act, the Blakely Ridge controversy is a product of a vaguely written statute that leaves much room for interpretation.

### 3. *Challenged by an Intentionally Vague Statute*

The controversial legislative history of the GMA produced several defects: “politically necessary omissions, internal inconsistencies, and intentionally vague language.”<sup>124</sup> Each makes the task of interpreting the GMA difficult and produces disagreement about the Legislature’s true intent. *Clark County Natural Resources Council v. Clark County*<sup>125</sup> illustrates the difficulty the Boards face when attempting to apply vague and contradictory statutory provisions. The case addressed whether an

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118. Sarah Lopez Williams, *Project’s Foes Say They’ll Go to Court*, Seattle Times, Dec. 20, 1995, at B1.

119. See Simmons, *supra* note 114, at 15.

120. *Id.* at 16.

121. See Williams, *supra* note 118. Wash. Rev. Code § 36.70A.350 (providing “new fully contained communities” safe harbor exception that allows urban-like development outside of UGA if certain criteria are met).

122. See Vashon-Maury v. King County, 95-3-0008 CPSGMHB 1385, 1392 (Dec. 1995); see also Simmons, *supra* note 114, at 16 (conforming to “fully contained communities” exception requires that development meet “state-imposed criteria” that includes keeping communities “from sprawling outside their boundaries and urbanizing still more rural lands”).

123. See Williams, *supra* note 118. Friends of the Law, a citizens opposition group, contended that the King County Council “had no right to approve the project during a period when a state board had ordered revisions in the county comprehensive plans.” *Eastside Development Upheld*, Seattle Times, Oct. 20, 1996, at A4. The Snohomish County Superior Court upheld King County’s approval of the Blakely Ridge development. *Id.*

124. See Settle & Gavigan, *supra* note 4, at 881.

125. 92-2-0001 WWGPHB 5 (Nov. 1992).

ordinance complied with the requirements and goals of the Act.<sup>126</sup> The Western Board found that Revised Code of Washington section 36.70A.320 “presents a perplexing dichotomy as to the nature and standards of review to be used in answering that ultimate question.”<sup>127</sup> The Board explained that “on the one hand, the Legislature has directed that the development regulation is ‘presumed valid upon adoption,’ while [language] in the same section directs that ‘a preponderance of the evidence’ is the proper test to determine compliance.”<sup>128</sup> One explanation for the Legislature’s decision to produce vague statutory language is that it allows each region the *flexibility* to develop plans and regulations that address its individual concerns and needs.<sup>129</sup> This built-in flexibility may be used, however, by those opposed to state involvement to limit the scope and impact of the growth management legislation.<sup>130</sup>

Attempting to achieve flexibility through vaguely written provisions has turned out to be a double-edged sword. Although vagueness enables local government officials to customize plans to address specific issues facing their jurisdictions, it also places the task of interpreting key provisions in the statute on the Boards.<sup>131</sup> In particular, the Boards have a substantial amount of discretion to decide their role, scope of authority, and what force and effect the GMA should have on communities.<sup>132</sup> The Central Board has found that “by necessary implication [it] must interpret the GMA where . . . unclear or vague in order to give [the Act] meaning and promote consistency within the region.”<sup>133</sup> In exercising this discretion, local governments accuse the Boards of going beyond a

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126. *Id.*

127. *Id.* at 6.

128. *Id.*

129. Diane Brooks, *Developers Sue Over Growth Limits: Builders Say Puget Sound Board Usurps Snohomish County Rights*, Seattle Times, Feb. 28, 1996, at B3. “Flexibility” is a concept used to describe statutory language that enables a person to choose from several possible interpretations depending on the facts of the situation.

130. See Percival et al., *supra* note 85, at 955 (citing Robert Liberty, *The Oregon Planning Experience: Repeating the Success and Avoiding the Mistakes*, 1 Md. Pol. Stud. 45, 46–55 (1988)).

131. See Bowler, *supra* note 83, at 20. “Where the Act is unclear or vague, the necessity for interpretation is greater than where it is clear. In the latter instance, the Board must derive the meaning of the statute from the wording of the statute itself.” *Sky Valley v. Snohomish County*, 95-3-0068c CPSGMHB 1631, 1637 (Mar. 1996) (citing *Rozner v. Bellevue*, 116 Wash. 2d 342, 347, 804 P.2d 24 (1991)).

132. See Bowler, *supra* note 83, at 20.

133. See *Sky Valley v. Snohomish County*, 95-3-0068c CPSGMHB 1631, 1633 (Mar. 1996). An example of where the Central Board has determined that it “must ‘fill in the gap’ because of the GMA’s ambiguity is the statutory scheme in [Revised Code of Washington section] 36.70A.070(5) and .110.” *Id.* at 1638–39 (defining ambiguous terms such as urban, rural lands, and rural densities).

simple determination of compliance towards making policy decisions for cities and counties.<sup>134</sup> For example, *Berschauer v. Tumwater*<sup>135</sup> demonstrates that the Western Board has interpreted the GMA to impose a high standard on jurisdictions that choose to prepare subarea or neighborhood plans.<sup>136</sup> The Western Board rejected the city's argument that if a plan generally complies with the GMA's goals and requirements, a city should be given the discretion to determine within its borders exactly how to meet that plan's goals and requirements.<sup>137</sup>

## II. LEGAL ANALYSIS OF THE CRITICISMS DIRECTED AT THE BOARDS

Although the tension surrounding the boards is partially attributable to external factors,<sup>138</sup> there remain some legitimate criticisms that produce frustration and uncertainty among county and city officials attempting to balance GMA requirements with the needs of their constituents. Local governments are displeased with the large number of petitioners given standing, the misuse of the standard of review, the interference in purely legislative matters, and the contradictory interpretations of procedural rules. First, the Boards are accused of liberally applying the GMA standing provision; given the broad language of the standing provision, however, the Boards actually have applied a stricter interpretation than needed to comply with the provision. Another criticism of the Boards is that they misinterpret the standard of review by requiring a lower burden of proof than intended by the Legislature. This criticism is supported by the Legislature's attempt to clarify the standard of review provision. By extensively scrutinizing actions taken by elected city and county officials, the Boards have been accused of exceeding their legislatively intended role and unconstitutionally usurping power from local governments. Although local governments must comply with the GMA, the issue is the extent to which the Boards should interfere in local land use decision-making to ensure that local governments comply with the Act. The final criticism in this part concerns inconsistent interpretations

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134. *Id.* at 20–21; see also H.B. 2409, 54th Leg., Reg. Sess., § 5 (Wash. 1996).

135. 94-2-0002 WWGMHB 529 (July 1994).

136. Tayloe Washburn, *Update on Decisions of Growth Management Hearings Board and Impact on Cities and Counties*, Land Use & Municipal News (Foster Pepper & Shefelman, Seattle, Wash.), Nov. 1995 at 4.

137. *Berschauer v. Tumwater*, 94-2-0002 WWGMHB 529, 531 (July 1994); see also *supra* note 69.

138. See discussion *supra* part I.C.

of procedural rules among the Boards in violation of the GMA. Each of these criticisms will be discussed and evaluated below to determine whether they have merit.

### A. *Lax GMA Standing Provision*

Over the years the number of petitions filed before the three Boards has grown at a rapid pace.<sup>139</sup> The burden of responding to a large number of petitions has prompted local governments to attempt to limit the scope of the standing provision as applied by the Boards.<sup>140</sup> Several counties have argued that many petitioners granted standing by the Boards were too far removed from the impact of the county or city action.<sup>141</sup> The current standing provision enables nearly anyone to petition the Boards to challenge a jurisdiction's enactment of its comprehensive plan or development regulations.<sup>142</sup> Moreover, Board members have indicated that petitioners should be able to bring an action without the assistance of an attorney.<sup>143</sup>

Rather than giving the standing provision a liberal interpretation as some critics suggest, the Boards have interpreted the standing provision as more restrictive than the statutory language indicates.<sup>144</sup> The Central Board has construed "appearing before a local legislative body" to mean "either [1] by personally appearing at a [public] hearing or meeting at some time during the process, [2] by personally appearing and participating or testifying at a [public] hearing or meeting during the process, or [3] by submitting written comments to the local jurisdiction or its agents."<sup>145</sup> Both the Central Board and Eastern Board have held

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139. Eglick & Sterbank, *supra* note 64, at 5B-4. For example, the Central Board has received petitions for review in 114 cases since its inception in 1992. Most were filed in 1995. *Id.* at 5B-4 n.4.

140. H.B. 2409. The bill indicates that local governments find the Boards' application of the standing provision to be too liberal.

141. H.B. 2409.

142. See Wash. Rev. Code § 36.70A.280(2); see also Smith, *supra* note 7, at 145.

143. See Nielsen et al., *supra* note 32, at 1334 (suggesting that petitioner can manage without assistance of attorney and rely on Board to hear and decide case fairly).

144. *Id.*

145. Friends of the Law & Bear Creek Citizens for Growth Management v. King County, 94-3-0003 CPSGPHB 341, 346 (Apr. 1994) (citing Twin Falls, Inc., v. Snohomish County, 93-3-0003 CPSGPHB 155 (June 1993)). The Central Board has cautioned, however, that it expects active public participation and that mere attendance at a public meeting without testifying would not be enough to establish appearance standing. *Id.* at 346-47; see also Association to Protect Anderson Creek v. Bremerton, 95-3-0053 CPSGMHB 1237, 1243 (Oct. 1995) (finding that if organization

that oral comments to county staff are, by themselves, insufficient to constitute “appearing.”<sup>146</sup> The Western Board has construed the provision to require that a person must “appear” regarding a matter by commenting or attempting to comment upon the matter verbally or in writing.<sup>147</sup>

The liberal standing argument has merit, but it ignores the question of why so many petitions are filed in the first place.<sup>148</sup> Restricting access to the Boards by making the standing provision more stringent would serve only to frustrate the dispute resolution process by forcing petitioners to appeal to superior court for the opportunity to present their case. Although the presumption of validity, discussed below, is intended to filter out frivolous petitions, the Boards’ application of the presumption is claimed to be flawed and therefore ineffective at reducing the number of petitioners granted standing.

### *B. Flawed Interpretation and Application of the Standard of Review*

The GMA provides that “[c]omprehensive plans and development regulations, and amendments thereto, adopted under [the GMA] are presumed valid upon adoption.”<sup>149</sup> After fully considering the petition and the criteria adopted by the DCTED, “the Board [must] find compliance unless it finds by a preponderance of the evidence that the state agency, county, or city erroneously interpreted or applied [the GMA].”<sup>150</sup>

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wants to obtain standing before Board under appearance standing standard, it must put local government it is opposing on notice that it has interest in matter).

146. See Eglick, *supra* note 64, at 5B-6; see also *Friends of the Law*, 94-3-0003 CPSGPHB at 346; *Save Our Butte Save Our Basin Society v. Chelan County*, 94-1-0001 EWGMHB 369, 370-71 (Mar. 1994).

147. See Eglick, *supra* note 64, at 5B-6; see also *Loomis v. Jefferson County*, 95-2-0066 WWGMHB 931, 932 (June 1995).

148. See Postman, *supra* note 81 (stating that 300 cases have been filed with Boards since 1992). Oregon has a very liberal standing provision but has not faced a flood of frivolous petitions. See Or. Rev. Stat. § 197.830(2) (1995); see also Robert L. Liberty, *Oregon’s Comprehensive Growth Management Program: An Implementation Review and Lessons for Other States*, 22 *Env’tl. L. Rep.* 10367, 10373-74 (1992).

149. Wash. Rev. Code § 36.70A.320. Because only comprehensive plans and development regulations are presumed valid upon adoption, a county or city arguably must put forth a *prima facie* case establishing the validity of enactments not falling under those two categories. Bowler, *supra* note 83, at 154-55.

150. Wash. Rev. Code § 36.70A.320. Although comprehensive plans and development regulations adopted under the Act are presumed valid, “jurisdictions whose plans are challenged will be obliged to furnish a record for [the] review process.” Wash. Admin. Code § 365-195-050 (1995). This presumption is intended to discourage meritless appeals.

Local governments have argued that the Boards have not accorded adequate deference to plans and regulations adopted by county and city officials.<sup>151</sup> The Boards allegedly have ignored the presumption of validity by allowing insignificant amounts of evidence to overcome the burden.<sup>152</sup> Whether or not intended by the Legislature, the Boards make determinations as to whether a local community is following “the *letter* as well as the *spirit* of the GMA” when deciding if the presumption of validity will stand.<sup>153</sup> The Boards have given less deference to counties and cities that do not substantiate their decisions on the record.<sup>154</sup>

The Central Board has required that the contested comprehensive plan or development regulation be presumed valid if already adopted.<sup>155</sup> The presumption can be overcome by a preponderance of the evidence in the record demonstrating that the county or city comprehensive plan or development regulation is not in compliance with any part of the GMA, regardless of the consequences.<sup>156</sup> This leaves the county or city exposed to full scrutiny by the Board when a minor discrepancy is found with the comprehensive plan or a development regulation.

*Aagaard v. Bothell*<sup>157</sup> demonstrates the ease with which a petitioner can meet the preponderance of evidence standard. By presenting the Central Board with a laundry list of claims, the petition increased the chances that at least one claim would suffice to overcome the presumption of validity.<sup>158</sup> Although the petitioners alleged a number of bases on which the Board might find the plan in violation of the GMA,

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151. H.B. 2409, § 1.

152. H.B. 2409, § 1.

153. *Children's Alliance v. Bellevue*, 95-3-0011 CPSGMHB 1003, 1005 (July 1995) (“The Act prohibits local prerogatives, whether expressed in policy documents or development regulations, from thwarting legitimate regional and state interests.”); *Port Townsend v. Jefferson County*, 92-2-0006 WWGPHB 565, 571 (Aug. 1994) (finding “ultimate reason for the [Boards’] existence is to make decisions that further the ‘planning’ concepts, directions, goals and requirements of the GMA, and to lesser extent, to make determinations as to legal interpretations of the Act”); *Clark County Natural Resources Council v. Clark County*, 92-2-0001 WWGPHB 5, 14 (Nov. 1992) (Nielsen, dissenting) (suggesting that hearings boards are obligated to review record to ensure that local actors appropriately “balance” goals of GMA).

154. *See Whatcom Envtl. Council v. Whatcom County*, 94-2-0009 WWGMHB 621, 622 (Nov. 1994) (finding that because county failed to substantiate its decisions on record, petitioner had overcome burden of proof).

155. *Twin Falls, Inc., v. Snohomish County*, 93-3-0003 CPSGPHB 183, 223 (Sept. 1993).

156. *Id.*

157. 94-3-0011 CPSGMHB 711 (Feb. 1994) (allowing challenge to Bothell’s comprehensive plan brought by individual property owners who objected to plan’s designation of their respective properties).

158. *See id.* at 717–31.

the only claim with which the Central Board agreed was the invalidation of the plan's policy dealing with senior housing.<sup>159</sup> The Board found that the city, having chosen to address senior housing, failed to analyze adequately the impacts of this senior housing policy on capital facilities, the cost of increased capital facilities, and the impact on the city's transportation and sidewalk policies.<sup>160</sup> On remand, the Board directed the city to conduct additional analysis in each of these areas.<sup>161</sup>

In 1996, the Governor vetoed a bill that amended the presumption of validity provision.<sup>162</sup> The bill expanded the presumption of validity beyond comprehensive plans and development regulations to encompass any action required by the GMA.<sup>163</sup> In addition, the bill replaced the preponderance of the evidence standard with a more restrictive standard:

The board shall find compliance unless it finds that: (i) The state agency, county, or city erroneously interpreted this chapter; or (ii) the action of the state agency, county, or city is not supported by evidence that is substantial when reviewed in light of the whole record before the board.<sup>164</sup>

The fact that a sizable majority of both houses passed the bill demonstrates that the Legislature intended the Boards to interpret and apply the presumption of validity more conservatively.<sup>165</sup>

### C. *Legislating for Local Government*

If the presumption of validity is overcome, the county or city must demonstrate that their plan or ordinance complies with the Act based on "a record which documents deliberations, shows data relied upon, and explains how conclusions were reached."<sup>166</sup> The Boards are criticized for being too strict when scrutinizing locally adopted plans and ordinances.<sup>167</sup> The issue is not whether the Boards should demand local

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159. *Id.* at 723-25.

160. *Id.* at 725.

161. *Id.* at 731.

162. S. 6637, 54th Leg., Reg. Sess. (Wash. 1996) (amending Wash. Rev. Code § 36.70A.320); see also *id.*, partial veto message (Lowry, Gov., vetoing).

163. S. 6637.

164. S. 6637.

165. The bill passed the Senate by a vote of 41 to 7 and the House by a vote of 68 to 30. *Id.*

166. Wash. Admin. Code § 365-195-050 (1995).

167. See Richard D. Ford, *GMA Hearings Board Overreaches in Rewriting Public Policy Bear Creek Proposal Meets State-Mandated Criteria*, Seattle Post-Intelligencer, Dec. 19, 1995, at A15;



government compliance with the GMA, but to what extent state *appointed* officials should interfere with individual policy decisions that have been subjected to public scrutiny and approved by locally *elected* officials.<sup>168</sup>

For example, the GMA states that the thirteen goals are to be *considered* by the local government when planning or adopting regulations, and no weighing or order of priority is specified.<sup>169</sup> The Boards, however, view the thirteen goals of the Act as "a pocket of legislative commands that local planners, or even local legislators, may not eviscerate with planning decisions."<sup>170</sup> "Within this paradigm, the [Boards] alone have the power to ultimately enforce the goals of the Act."<sup>171</sup> The Boards have given the goals the force of law and have been doing their own weighing and balancing of the goals in establishing planning priorities.<sup>172</sup>

The Central Board has overreached its legislatively intended authority by adopting "bright line" rules on what the appropriate densities are for urban and rural areas.<sup>173</sup> The GMA itself is silent on exact densities, because local governments were presumed to have discretion in defining those densities within the general parameters of the GMA goals.<sup>174</sup> If a

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*see also supra* note 24 (discussing Legislature's intention of leaving land use decisions largely in hands of local decision-makers).

168. *See Bowler, supra* note 83, at 20-21 ("[T]he hearings boards, in negating any substantive local decision, are arguably commandeering a 'super-legislative veto,' selecting their policy preferences over those expressed by the locality.").

169. Wash. Rev. Code § 36.70A.020 (providing that "goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations").

170. *See Bowler, supra* note 83, at 20.

171. *Id.* at 21.

172. *Id.* at 20-21. The actions of the Boards do not comply with the Act insofar as the Legislature intended the process of planning to be bottom up. *See supra* note 24.

173. *See Sky Valley v. Snohomish County*, 95-3-0068c CPSGMHB 1631, 1634-43 (Mar. 1996) (rejecting argument by Snohomish County that Boards lack authority to adopt substantive "bright line" rules for urban and rural densities); *Vashon-Maury v. King County*, 95-3-0008 CPSGMHB 1245, 1296 (Oct. 1995) (adopting as general "bright line" rule that any residential pattern of 10 acre lots or larger is rural); *Bremerton v. Kitsap County*, 95-3-0039 CPSGMHB 1167, 1200 (Oct. 1995) (adopting as general "bright line" rule that any residential pattern of four net dwelling units per acre is urban); *Berschauer v. Tumwater*, 94-2-0002 WWGMHB 529, 531 (July 1994) (rejecting Tumwater's argument that City has discretion to designate land use within subarea component of comprehensive plan as city sees fit, as long as overall plan is shown to have met requirements of the Act). This is fairly radical and throws into doubt a large amount of existing zoning and planning for suburban areas in the middle (not rural or urban). For example, local governments are having difficulty determining where one acre per unit lots fit within the GMA construct.

174. *See supra* note 24. Administrative agencies are "creatures of the legislature without inherent or common law power" and can only exercise those powers conferred either expressly or by

density level selected by the county or city does not meet the “bright line” standard, the Central Board will subject the plan “to increased scrutiny . . . to determine if the number, locations, configurations and rationale for such lot sizes complies with the goals and requirements of the Act, and the jurisdiction’s ability to meet its obligations to accept any allocated share of county-wide population.”<sup>175</sup>

The Central Board has interpreted its role as being more than merely adjudicatory but limited “to determining whether the *legislative actions* taken by local legislative authorities actually comply with the requirements of the GMA.”<sup>176</sup> The Central Board will defer to the local government therefore if the challenge is to a local, *quasi-judicial* governmental decision.<sup>177</sup> Despite this self-declared limitation, the Central Board is accused of “tak[ing] it upon itself to cherry-pick and change public policy with which it doesn’t agree.”<sup>178</sup> One example of the increased tension arising from the Central Board’s scope of review is a suit by the Master Builders Association of King and Snohomish Counties (Master Builders).<sup>179</sup> The Master Builders claimed that the Central Board

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necessary implication. *Human Rights Comm’n v. Cheney Sch. Dist.* 30, 97 Wash. 2d 118, 125, 641 P.2d 163, 166-67 (1982) (quoting *State v. Munson*, 23 Wash. App. 522, 524, 597 P.2d 440, 442 (1970)).

175. *Bremerton v. Kitsap County*, 95-3-0039 CPSGMHB 1167, 1200 (Oct. 1995).

176. *See Twin Falls, Inc., v. Snohomish County*, 93-3-0003 CPSGMHB 183, 216 (Sept. 1993); *see also Bowler, supra* note 83, at 123 (suggesting that making distinction between “quasi-judicial” and “legislative” actions by local government is difficult). Legislative actions are characterized by the Central Board as:

1) adopting, amending or revising comprehensive . . . plans or other land use planning documents; 2) adopting zoning amendments of “area-wide significance;” 3) adopting area-wide zoning ordinances; 4) debating “public policy;” employing ultimate decision-making discretion; and, 5) responding “to changing conditions through the enactment of a new general law of prospective application.”

*Id.*

177. *See Bowler, supra* note 83, at 123. Quasi-judicial acts are characterized by the Central Board as:

1) determining of legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding; 2) examining and cross examining sworn witnesses; ensuring “procedural due process and appearance of fairness in regulatory hearings;” 3) interpreting, reviewing and implementing land use regulations;”[sic] 5) invoking the traditional and ordinary function of courts; and, 6) applying “existing law to past or present facts for the purpose of declaring or enforcing liability.”

*Id.* at 123–24; *see also supra* note 55.

178. *See Ford, supra* note 167. The Central Board is accused of splitting off and disapproving pieces of county plans and selectively entering into public policy areas reserved to local legislative bodies. *Id.*

179. *See Brooks, supra* note 129.

had "meddl[ed] too deeply with Snohomish County's environmental policies."<sup>180</sup> The Central Board found Snohomish County's critical areas protection laws too lax.<sup>181</sup> Criticizing the Central Board's decision, the Master Builders' have "call[ed] it arbitrary, capricious, and in violation of the board's legal mandate to uphold the principle of local decision-making."<sup>182</sup> The suit cites prior Eastern and Western Board decisions as evidence of local governments being allowed to create less stringent regulations to protect wetlands and other sensitive areas.<sup>183</sup>

Although appeals have been made to state courts and the Legislature calling for limitations on the Boards' authority to interfere with local legislation, none have succeeded at delineating the appropriate amount of authority given to the Boards under the GMA.<sup>184</sup> The question remains, therefore, whether the Boards are acting as policy-makers for local jurisdictions. The answer would appear to be yes given that the Legislature recently passed a bill clarifying the role of the Boards.<sup>185</sup>

#### *D. Procedural Rules Inconsistently Interpreted and Applied by the Boards*

Unlike other Washington state administrative boards, which have statewide geographic jurisdiction,<sup>186</sup> the Legislature created three

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180. *Id.*

181. *Pilchuck v. Snohomish County*, 95-3-0047 CPSGMHB 1409 (Dec. 1995) (rejecting county's exemption of 43,000 lots, consisting of one-third of county, from new law and requiring buffers even around small wetlands).

182. *See Brooks*, *supra* note 129. According to John Spangenberg, the Master Builders' Snohomish County Director, the fundamental rationale of growth management rests upon who makes the decisions. *Id.*

183. *Id.*

184. House Bill 2409 was vetoed by the Governor. Chelan County's petition was rejected by the Washington Supreme Court. *Chelan County v. State*, Petition to the Washington Supreme Court Against State Officers and Declaratory Judgment, Dec. 15, 1995.

185. As mentioned previously, the Legislature passed a bill in 1996 amending Revised Code of Washington section 36.70A.320. *See* S. 6637 § 5. In that bill, the Legislature added language clarifying that "[i]n recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of . . . [the GMA], the board shall not substitute its judgment for that of a county or city regarding the exercise of such discretion." The bill also stated that "[t]he board has no discretion to prioritize, balance, or rank the [thirteen] goals . . ." § 5.

186. *See, e.g.*, Wash. Rev. Code § 43.21B.010 (1994) (creating pollution control hearings board with statewide jurisdiction); Wash. Rev. Code § 75.20.130 (1994) (creating hydraulic appeals board with statewide jurisdiction); Wash. Rev. Code § 76.09.210 (1994) (creating forest practices appeals board with statewide jurisdiction); Wash. Rev. Code § 90.58.170 (1994) (creating shorelines hearings board with statewide jurisdiction).

independent regional Boards.<sup>187</sup> Regional diversity appears to be the key reason for creating three Boards.<sup>188</sup> Nonetheless, the three Boards are required to jointly adopt rules of practice and procedure and abide by the Washington APA.<sup>189</sup> In theory, then, although interpretations of GMA provisions by the three Boards may not always be consistent, the procedural rules promulgated by the Boards must be applied consistently.

Procedural rules, however, have been inconsistently interpreted among the Boards. For example, the Boards have disagreed both on the appropriate application of the standard of review and on the binding effect of final orders. These fundamental differences have translated into local governments and practitioners receiving mixed messages regarding procedure before the Boards. If the difference in treatment is not related to regional accommodation, as appears the intention of the Legislature when it created three separate Boards,<sup>190</sup> then the differences must derive from a failure by the Boards to agree upon the interpretation of a rule or provision of the GMA.<sup>191</sup>

### 1. *Standard of Review*

The Western Board and the Central Board have developed different applications of the standard of review.<sup>192</sup> In interpreting part of the GMA, both the Central and Western Boards have established the scope of review as whether the enactment complies with the requirements and

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187. See *supra* note 36 and accompanying text.

188. See Wash. Rev. Code § 36.70A.190(4)(b) (requiring that DCTED adopt procedural criteria, to assist counties and cities with planning, that reflect regional and local variations); Wash. Rev. Code § 36.70A.250(2); Wash. Admin. Code § 242-02-020 (1995) (“The function of a board is to make informed decisions on appeals . . . that recognize[] regional diversity.”); see also *West Seattle Defense Fund v. Seattle*, 94-3-0016 CPSGMHB 773, 774 (Apr. 1994). The Central Board has reminded parties “that the legislature created three *independent* growth management hearings boards in an acknowledgment of this State’s regional diversity.” The Board noted that “[t]his feature is one of the hallmarks of the GMA, patterned after our judicial system with its three independent divisions of the Court of Appeals.” *Id.*

189. See *supra* note 57.

190. See *supra* note 188.

191. *West Seattle Defense Fund*, 94-3-0016 CPSGMHB at 774. Although the Central Board has agreed to review and consider the decisions of the other hearings boards, it has reiterated that it must make its own determination as to the proper interpretation of the Act within the Central Puget Sound region. The Board also noted that “[b]riefs of parties that cite to decisions of other boards under the erroneous assumption that those decisions are binding upon this Board, do lose some credibility with the Board.” *Id.*

192. Wash. Rev. Code § 36.70A.320(1) (stating standard of review to be applied).

goals of the Act.<sup>193</sup> Having determined the scope of its review, the Western Board has admitted its difficulty in determining the standard of review.<sup>194</sup> The Western Board has used a "mid-tier" analysis that, in modified form, harmonizes the provisions within the Act in such a manner that complies with both the overall scheme and philosophy of the Act and also complies with legislative intent.<sup>195</sup>

The Central Board did not find the question of the proper standard of review as perplexing as the Western Board, observing: "To reach a finding of inconsistency [with the GMA], the Board must determine that the presumption of validity granted local government by [Revised Code of Washington section 36.70A.320] has been overcome by a preponderance of the evidence."<sup>196</sup> The Central Board has strictly interpreted the Act's standard of review as stated at Revised Code of Washington section 36.70A.320,<sup>197</sup> refusing to adopt the Western Board's four-part standard of review.<sup>198</sup>

Each Board continues to interpret Revised Code of Washington section 36.70A.320 differently, regardless of the potential for opposite outcomes if given the same set of facts.<sup>199</sup> The Central Board is much more strict in its scrutiny of whether a local government is in compliance.<sup>200</sup> The result is that a local government brought before the Central Board receives a much closer examination than one brought before the Western Board.<sup>201</sup>

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193. *Gutschmidt v. Mercer Island*, 92-3-0006 CPSGPHB 81, 86 (Mar. 1993); *Tracy v. Mercer Island*, 92-3-0001 CPSGPHB 31, 43 (Jan. 1993); *Clark County Natural Resources Council v. Clark County*, 92-2-0001 WWGPHB 5, 5-6 (Nov. 1992); *see also* 23 Op. Wash. Att'y Gen. (1992) (requiring local governments consider GMA's planning goals, including Revised Code of Washington section 36.70A.020(6)).

194. *See supra* notes 125-128.

195. *See supra* note 69 and accompanying text.

196. *Tracy*, 92-3-0001 CPSGPHB at 43; *see also Gutschmidt*, 92-3-0006 CPSGPHB at 86.

197. *West Seattle Defense Fund v. Seattle*, 94-3-0016 CPSGMHB 773, 774 (Apr. 1994); *see also* *Twin Falls, Inc., v. Snohomish County*, 93-3-0003 CPSGPHB 183, 217-224 (Sept. 1993) (detailing how Central Board interprets GMA's standard of review, burden of proof, and presumption of validity).

198. *See supra* note 69 and accompanying text.

199. *See* Bowler, *supra* note 83, at 154-58.

200. *Id.*

201. *Id.*

## 2. *Final Orders*

The Central and Western Boards disagree on the binding effect of a final order upon remand to a local government.<sup>202</sup> This disagreement has little to do with regional differences in applying the Act and much to do with fundamental procedural differences, resulting in unnecessary confusion and frustration for those local governments and practitioners attempting to work within the framework of the Boards.

The Western Board has indicated that a Board has no authority to specifically order a particular action be taken after finding noncompliance.<sup>203</sup> Although the Western Board makes suggestions and recommendations, the local government is left to determine how it wishes to come into compliance with the Act.<sup>204</sup> Revised Code of Washington section 36.70A.330(1) states that a compliance hearing is for the purpose of determining whether the local government “is in compliance with the requirements of [the Act].”<sup>205</sup> The Western Board has interpreted this provision to mean whether the local government complied with the GMA and not whether there has been strict adherence to the recommendations issued in the final order.<sup>206</sup> The Western Board also decided “that matters which were not of the original finding of non-compliance cannot be used at the hearing as a basis for determining whether compliance has been achieved.”<sup>207</sup>

The Central Board has rejected the contention “that the [appropriate] test of compliance is solely whether [a county or city] complied with the statutory language of the GMA, rather than with the Board’s final decision and order.”<sup>208</sup> Agreeing with the Western Board, the Central Board has held that the ultimate discretion to implement the GMA rests with local governments.<sup>209</sup> The Central Board, however, has found “a

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202. A final decision and order represents a Board’s conclusion of what contested GMA provisions require or allow. Wash. Rev. Code § 36.70A.300.

203. *Port Townsend v. Jefferson County*, 94-2-0006 WWGMHB 639, 639-40 (Dec. 1994).

204. *Id.* (finding that “local decision-makers are the proper persons to implement the GMA as long as the parameters established by the Act are adhered to”).

205. Wash. Rev. Code § 36.70A.330(1).

206. *Port Townsend*, 94-2-0006 WWGMHB at 640 (finding that “[t]he specific mechanism for achieving compliance rests solely with local government”).

207. *Id.*

208. *Tacoma v. Pierce County*, 94-3-0001 CPSGMHB 1359, 1362 (Jan. 1995).

209. *Id.*

significantly different perspective on its own role in the process.”<sup>210</sup> According to the Central Board, the Boards are responsible for “interpret[ing] the GMA when it is unclear and/or in dispute and, based on the facts and arguments in a case, . . . issu[ing] findings and conclusions.”<sup>211</sup> Contrary to the Western Board, the Central Board has found that its final decision and order is “more than a mere suggestion or recommendation.”<sup>212</sup> The Central Board has concluded that by the time the compliance hearing takes place the county, city, or state agency “must comply not just with the statutory language but also with the Board’s final decision and order, however specific it might be.”<sup>213</sup> The Central Board claims to leave “the task of legislating . . . to the elected local policy makers” as provided by the GMA.<sup>214</sup> This does not square, however, with the Central Board’s practice of giving specific directions on how the local government is to comply with the GMA.<sup>215</sup>

### III. RECOMMENDATIONS

The following recommendations share a common goal—reducing some of the controversy surrounding the Boards without disturbing the benefits that accrue from them. While growth management laws seek to balance environmental values with private control of property, the ultimate effectiveness of growth management laws depends upon strong public support and political leadership.<sup>216</sup> Educating the public about the requirements and objectives of the GMA is critical to its success over the long run.<sup>217</sup>

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210. *Id.*; see also *Twin Falls, Inc., v. Snohomish County*, 93-3-0003 CPSGMHB 183, 223 (Sept. 1993).

211. *Tacoma*, 94-3-0001 CPSGMHB at 1362.

212. *Id.* at 1363; see, e.g., *Association of Rural Residents v. Kitsap County*, 93-3-0010 CPSGMHB 937, 939 (June 1994) (finding that local governments have “duty” to comply with final decision even if decision has been appealed).

213. *Tacoma*, 94-3-0001 CPSGMHB at 1363.

214. *Id.*

215. See Bowler, *supra* note 83, at 141.

216. See Percival et al., *supra* note 85, at 952.

217. Governor Lowry has found that “[p]eople acting in good faith have come to very different conclusions about how best to manage growth.” S. 6637, partial veto message (Lowry, Gov., vetoing). In response, he has requested that the Land Use Study Commission make recommendations to the Legislature and to the Governor regarding improvements to the GMA’s dispute resolution structure. Wash. Rev. Code §§ 90.61.010–.902 (Supp. 1995).

### *A. The Boards Should Be Maintained*

The Boards are vital to the successful implementation of the GMA. They alleviate the burden on the superior court system, provide a timely means of dispute resolution, and offer a high level of expertise in land use management.<sup>218</sup> The large number of petitions heard by the Boards and the constant backlog of cases in superior court demonstrates the need for a separate GMA dispute resolution system.<sup>219</sup> Moreover, Board members must be experts in the field of land use planning, thus resulting in a better understanding of the issues.<sup>220</sup> Presumably, fewer parties would appeal local government actions directly to the superior courts due to the high litigation costs, thus disputes may go unresolved, conflict may escalate, and the GMA may be much less effective at managing urban sprawl.

Despite the effort to comply generally with the GMA and the Boards' orders, most communities are facing monumental challenges that cannot be ignored.<sup>221</sup> Because the heart of the controversy is the GMA, the solutions must come from the Legislature.

### *B. The Legislature Should Clarify Vague Language in the GMA*

The Legislature should clarify vague language in the main provisions of the GMA as it leads to second-guessing by the Boards and those subject to their final decisions.<sup>222</sup> This uncertainty has created unnecessary frustration for local government officials and property owners and hindered support for the GMA. If the Legislature wants the Boards to have the discretion to interpret vague provisions in the GMA, then clearer authorizing language is necessary. On the other hand, if the Legislature wants to restrict the Boards' discretion, then a limitation on the Boards' interpretative powers is necessary. Based on the activities of the Boards to date, their experience in land use planning, and the limited state role prior to a petition being filed, the Legislature should reaffirm the Boards' authority to interpret the GMA. The Boards' discretion to interpret, however, should be qualified by a provision similar to that in the bill passed by the Legislature and vetoed by the Governor: the Boards

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218. See *supra* part I.A.2.

219. See *supra* notes 81 and accompanying text.

220. Wash. Admin. Code § 242-02-010 (1995).

221. See *supra* notes 87–89.

222. See *supra* notes 124–137.



should not substitute their own judgment for that of a county or city and the should have no discretion to prioritize, balance, or rank the thirteen goals for a local government.<sup>223</sup>

*C. The Burden Necessary To Overcome the Presumption of Validity Should Be Strengthened*

Strengthening the role of the DCTED, as explained below, or another state agency, similar to Oregon's Land Conservation and Development Commission,<sup>224</sup> would provide assurance to local communities that the county or city is in compliance with the GMA.<sup>225</sup> Once the comprehensive plan is approved, the Board would be limited to the precise issues raised in the petition and to the specific GMA provisions that are implicated. Only clear and convincing evidence, as opposed to a preponderance of the evidence, should overcome the presumption that a local action is valid. Early involvement by the state in the approval process would ensure that the comprehensive plan complies with the GMA and thereby reinforce the presumption of validity and lessen the need for aggressive review of local actions by the Boards.

*D. Procedural Rules Should Be Applied Consistently Among the Boards*

The Legislature mandated that the Boards promulgate a single set of procedural rules.<sup>226</sup> The Boards have not followed this mandate.<sup>227</sup> Regional diversity is not a factor where procedural rules are concerned.<sup>228</sup> The force and effect of a final decision and order should be decided by all three Boards and promulgated as a rule in the Washington Administrative Code. The rule should take into account the burden on local governments as they attempt to balance the goals of the GMA with the often conflicting demands of their residents. A single, straightforward interpretation of the GMA will serve to increase certainty for petitioners and respondents as to what is truly expected after a Board reaches its

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223. S. 6637 § 5; *see supra* part II.C.

224. *See* Edward J. Sullivan, *Oregon Blazes a Trail, in State & Regional Comprehensive Planning: Implementing New Methods for Growth Management* 50, 52 (Peter A. Buchsbaum & Larry J. Smith eds., 1993).

225. *See infra* part III.F.

226. *See supra* note 57 and accompanying text.

227. *See supra* part II.D.

228. *Id.*

final decision. Similarly, the standard of review and scope of review should be the same among all three Boards.

*E. Appeals Should Be Made Directly to the Court of Appeals Instead of Superior Court*

Washington should follow Oregon's land use appeals process by enabling parties to appeal Board decisions directly to the court of appeals instead of superior court.<sup>229</sup> First, a decision from the court of appeals will carry more precedential weight in an area of the law desperately in need of judicial guidance. Second, Board decisions are generally not heard de novo, suggesting that a court of review would be more appropriate forum than a trial court. Finally, the tendency for GMA issues to repeat themselves throughout the state suggests the need for a quick response, a clear statewide message, and a published opinion.

*F. The DCTED's GMA Role Should Be Expanded and Strengthened*

The DCTED should be the rule-making and broad enforcement agency of the GMA, and the Boards the adjudicatory agency. The Legislature limited the role of the DCTED in the implementation of the GMA.<sup>230</sup> A vacuum exists where a formal state enforcement and review process belongs. The Boards have been forced to fill this vacuum by comprehensively reviewing local government actions for discrepancies with the GMA requirements.<sup>231</sup> The task of reviewing whether a plan has complied with the GMA, however, should reside with a state agency that is not empowered to hear individual petitions. The responsibility for oversight should reside with the DCTED to ensure that all comprehensive plans and development regulations are and continue to be consistent with the goals and requirements of the GMA. In other words, the Boards should act as the "safety valve" for challenges that erupt after approval of local government planning activities by the DCTED.<sup>232</sup>

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229. See Sullivan, *supra* note 224, at 78. In Oregon, judicial review of LUBA orders may be sought in the Oregon Court of Appeals by any party under Or. Rev. Stat. § 197.850 (1995). *Id.* Only about 20% of LUBA decisions are appealed. See Liberty, *supra* note 148, at 10374.

230. See Wash. Admin. Code § 365-195-020 (1995). Although the Legislature adopted bottom up planning to assuage local government concerns about a strong state presence in land use decisions, the Boards have created that state role nonetheless, and perhaps in a more antagonistic way.

231. See *supra* part II.C.

232. This would be similar to the scheme used under the Shoreline Management Act, Revised Code of Washington chapter 90.58 (1994). The Department of Ecology is authorized to review and

Unlike Oregon and Florida, the Washington growth management program provides for little direct oversight by the state over counties and cities that plan under the GMA.<sup>233</sup> No formal review or approval is required by the state for a county or city to be considered "in compliance" with the GMA.<sup>234</sup> The DCTED does have limited oversight powers, but exists mostly as an advisory body and conduit for funding GMA planning activities and providing technical assistance.<sup>235</sup> If the GMA is truly a statewide effort to implement consistent land use and resource management policies and control growth, then compliance is essential. Oregon and Florida have proven that a state enforcement mechanism must at some point be implemented.<sup>236</sup> The Boards are neither empowered nor equipped to deal with both widespread enforcement and individual petitions. Therefore, the DCTED should be empowered to review and approve all comprehensive plans and amendments prior to their adoption by local governments. The Boards would then be limited to individual cases of noncompliance with the objective of addressing only the specific issues alleged.<sup>237</sup>

Increasing the scope of the mediation program offered by the DCTED also may provide a less controversial method of compromise for disputing parties. But the refusal by some local government officials, private property owners, and developers to "buy into" the policies of the GMA may thwart widespread use of the mediation services.

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approve master programs and amendments to master programs to ensure that they comply with the goals and policies of the Shoreline Management Act as stated in Revised Code of Washington section 90.58.020. Wash. Rev. Code § 90.58.090 (1994). The Department's actions are subject to appeal by a local government to either a Growth Management Hearings Board or the Shoreline Hearings Board. Wash. Rev. Code § 90.58.190 (1994).

233. See Gavigan, *supra* note 4, at H-9.

234. See Smith, *supra* note 7, at 143-44. Oregon subjects all local plans and regulations that have been adopted by local jurisdictions to a formal review by the State Land Conservation and Development Commission (LCDC), a process known as "acknowledgment." Or. Rev. Stat. §§ 197.251-254 (1995); see also Or. Rev. Stat. § 197.015(1) (1995) (defining "acknowledgment").

235. Wash. Rev. Code § 36.70A.190; Wash. Admin. Code § 365-195-020 (1995).

236. See *supra* notes 40-42 and accompanying text.

237. The standard of review should be similar to that used by the Shoreline Hearings Board when it reviews local government rules, regulations, or guidelines that have been approved by the Department of Ecology. The approved rule, regulation, or guideline is presumed valid unless the Shoreline Hearings Board finds that it is clearly erroneous in light of the policy of the Shoreline Management Act, is a violation of the constitution, is arbitrary or capricious, was developed without fully considering and evaluating all material submitted to the department during public review and comment, or was not adopted in accordance with required procedures. Wash. Rev. Code § 90.58.180 (1994).

## V. CONCLUSION

At each stage of GMA implementation, tough choices must be made that may have significant negative impacts on specific classes of persons. Targeting the Boards may be easier than acknowledging the negative consequences of compromise and change. The Boards may be exceeding their mandate in the GMA, but this may be explained partially by the vagueness of the Act and the politics of growth management that create a tense setting for resolving very controversial and often complex disputes. The responsibility rests with each person affected by the GMA to become involved in the legislative process in an effort to develop a growth management strategy that works. Effectively implementing the GMA is in the best interest of the larger population of Washington. The role of the Boards, therefore, should be reviewed and clarified by the Legislature in cooperation with local government representatives. The objective should be to reduce the burden on local governments while ensuring that public and private parties have an effective system available for resolving the inevitable conflicts that will arise over the GMA.

